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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/769,628	01/25/2001	George B. Diamond	P/2790-71	5333

2352 7590 04/04/2003

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EXAMINER

WEINSTEIN, STEVEN L

ART UNIT PAPER NUMBER

1761

DATE MAILED: 04/04/2003

9

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/769628

Applicant(s)

DIAMOND ET AL

Examiner

S. WEINSTEIN

Group Art Unit

1761

— The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address —

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- ☒ Responsive to communication(s) filed on 10/25/02
- ☐ This action is **FINAL**.
- ☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- ☒ Claim(s) 1-32 is/are pending in the application.
- Of the above claim(s) 6-14, 23-32 is/are withdrawn from consideration.
- ☐ Claim(s) _____ is/are allowed.
- ☒ Claim(s) 1-5, 15-22 is/are rejected.
- ☐ Claim(s) _____ is/are objected to.
- ☐ Claim(s) _____ are subject to restriction or election requirement

Application Papers

- ☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on _____ is/are objected to by the Examiner
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119 (a)-(d).
- ☐ All ☐ Some* ☐ None of the:
- ☐ Certified copies of the priority documents have been received.
- ☐ Certified copies of the priority documents have been received in Application No. _____
- ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a))

*Certified copies not received: _____

Attachment(s)

- ☒ Information Disclosure Statement(s), PTO-1449, Paper No(s) 5
- ☒ Notice of Reference(s) Cited, PTO-892
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948
- ☐ Interview Summary, PTO-413
- ☐ Notice of Informal Patent Application, PTO-152
- ☐ Other _____

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Applicants' response filed 12/2/02 to the restriction requirement mailed 10/25/02, paper no. 6 has been considered. The restriction requirement required an election between two inventions; a container with a headspace volume altering system and a container with an internal splash guard (see page 3 of the requirement). If the former was elected, an election of species was further required between the particular species of headspace volume altering system. Applicant elected the headspace volume altering system invention and, in particular, the raised portion species. Therefore, claims 23-27, which are directed to the second invention that is only to an internal splash guard container arrangement are directed to a non-elected invention. Therefore, the claims to be examined are 1-5 and 15-22 and claims 6-14 and 23-32 are withdrawn from further consideration as being drawn to a non-elected invention and species.

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1-5 and 15-22 are rejected under 35 USC 112, first paragraph as being non-enabling. Claim 1 recites a container with a top and bottom end and that the container is sealed. The claim also recites in the preamble and lines 2-3 that the apparatus is "for" containing edible material and that the container is "for" containing edible material that is sterilized and contains an inert gas under pressure. The specification does not support a closed or sealed container which is empty which is how claim 1 can be construed. It is suggested that claim 1 can be amended to positively recite that the sealed container contains a sterilized edible material that has been

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sterilized and contains an inert gas under pressure. This would overcome this rejection. Without the product and the inert gas under pressure, the container can house any product, whether it undergoes pressure differentials or not, and whether the structure functions for some other purpose. Also, as disclosed, the top end has a "raised" portion for a particular purpose. As disclosed, the objective of the invention is to provide an end with a concave slope which can flex inwardly or outwardly yet provide, between the top level of the contents and the top lid, a greater headspace than the prior art concave lids were able to provide. Thus, as disclosed, this additional headspace would enable the container to absorb greater pressure than the conventional concave lidded containers to avoid the need to provide overpressure during sterilization in the container. The structural elements and their functional relationship to each other are not brought out in the claims. In fact, claims 1 only recites that the top end has a "raised" portion formed inwardly of the side wall. What is this raised portion referencing? That is, the portion is "raised" in relation to what?

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 2, 4, 15, 16 and 19-21 are rejected under 35 U.S.C. 102(b) as being anticipated by Diamond et al (5,804,237).

In regard to claim 1, Diamond et al discloses a thin walled sealed container for sterilized edible material and an inert gas wherein the container is maintained rigid by

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the pressure of the gas but being easily deformable in the absence of pressure, the container having top and bottom end with at least one end having a concave slope which end being of a material and thickness and shape such that it will retain a substantially concave slope before, during and after sterilization and will become convex only if additional gas pressure is generated due to bacterial action. Note, too, that Diamond et al also shows a raised portion (actually two raised portions) relative to the concave portion and the portions of the lid between the raised portions. This is all claim 1 positively recites. In regard to claim 2, Diamond et al discloses wall beading (col. 6, para. 3). In regard to claim 4, Diamond et al discloses an internal bead formed in the top end and extending downwardly from the top end. The internal bead is the portion of the top end between the two raised portions. In regard to claim 15, Diamond et al discloses a depressed area in the top end immediately adjacent the side wall of the can and the raised portion is located adjacent and inwardly of the depressed portion. See Fig. 2c in this regard. In regard to claim 16, Diamond et al discloses a concavity located adjacent to and inwardly of the raised portion. See Fig 2c in this regard. In regard to claims 19-21, Diamond et al discloses that the configuration of the top end can be provided on the bottom end as well (e.g., "at least one end ..." - col. 3, para. 3).

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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Claims 3 and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Diamond et al as applied to claim 1 above, and further in view of Saunders (3,608,774). ✓

In regard to claims 3 and 5, since Diamond et al discloses beading of walls and ends are notoriously old, the beads would clearly have to be positioned so as not to interfere with a can opener since otherwise opening a can would clearly be anywhere from difficult to impossible. In any case, see Saunders who provides space for the opener.

Claims 17 and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Diamond et al as applied to claim 1 above, and further in view of Knize (3,799,388).

Claims 17 and 22 recite the height of the raised portion relative to the upper chime and the depth of the lower flat portion relative to the lower chime. The particular dimensional relationships relative to the chimes are seen to have been routine determinations in the absence of any interactive relationship between the dimensions and the remaining structural elements. In any case, Knize can be relied on to show that raised lid portions higher than the chime is notoriously old in the art and to substitute one conventional dimensional relationship for another conventional dimensional relationship would have been obvious.

Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Diamond et al as applied to claim 1 above, and further in view of Creegan (3,105,765) and Shepard (4,560,080).

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Claim 18 recites that the raised portion has an upper flat portion. Like the dimensional relationship discussed above, the geometric relationship is also seen to have been a routine determination. In any case, flat portions on raised lid portions are notoriously old as evidenced by Creegan and Shepard.

The remainder of the references cited on the USPTO 892 form are cited as pertinent art. It is also noted that many of the references cited in applicants' IDS statement show the features of the claims as well. For example, Claydon et al ('063) disclose beaded side walls, beaded ends (Fig. 12) and raised lead portions (both upper and lower lids (Fig. 2)); Malquist ('239) discloses raised portions in both upper and lower lids (Fig. 7); Wilkinson ('933) discloses raised ends with internal downwardly extending beads (Fig. 2); etc.

Any inquiry concerning this communication from the examiner should be directed to Steven Weinstein whose telephone number is 703-308-0650. The examiner can generally be reached on Monday-Friday 7:00am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone numbers for the organization where this application is assigned are 703-872-9310 for regular communications and 703-872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application should be directed to the receptionist whose telephone number is 703-308-0661.

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S. Weinstein/mn

April 2, 2003

Steve Weinstein
STEVE WEINSTEIN
PRIMARY EXAMINER
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